83 - 2063

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

V.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Pro se

5388

QUESTION PRESENTED FOR REVIEW

The lower courts abused judicial discretion in granting/affirming defendant's motion to dismiss for failure to prosecute when:

- Defendant relied in its Rule 41(b) motion on discovery issues that are properly treated under Rule 37 (Societé internationale pour participations industrielles et commerciales v. Rogers 357 US 197), a rule it did not use,
- The appeals court mistakenly equated the present case with Chira v. Lockheed Aircraft, 634 F 2d 664 (2d Cir. 1980), and with Lyell Theatre v. Loews, 682 F 2d 37 (2d Cir. 1982), in each of which defendant had availed itself of Rule 37,
- The true state of affairs on discovery is clouded due to substantial errors of fact regarding the record that appear in the district court's ruling (App. C),
- The lower courts did not note defendant's

failure to do or permit discovery,

- In granting defendant's motion to dismiss, the district court failed to consider the entire record thus omitting all reference to plaintiff's substantial and well-documented (in at least six items on record) explanation for a period of sparse docket entries,
- Had the district court considered the attorney-client relationship in light of Link v. Wabash Railroad, 370 US 626 (1962), as the appeals court suggests is proper, it would have appreciated that plaintiff's explanation for the period of sparse docket entries is an issue of responsible litigation,
- The lower courts have arrived at factual conclusions without evidentiary determination.

C O N T E N T S

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1984

NO._____

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated

PETITIONER,

v.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Geraldine Fennell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 25, 1983.

OPINION BELOW

The court of Appeals entered its de-

cision affirming the granting of defendant's motion to dismiss on November 25, 1983. A copy is attached (Appendix A).

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on March 13, 1984. A copy is attached (Appendix B).

JURISDICTION

On November 25, 1983, the Court of Appeals entered judgment affirming the granting of defendant's motion to dismiss (App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).[1]

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging. . . the right of the people to petition the Government for a redress of grievances.

[1] No other petitioner is involved.

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Under Title VII of the Civil Rights Act of 1964, 42 USC ¶2000e et seq., I filed my complaint against Warner Lambert in federal district court in June, 1977 (Record on Appeal 1), alleging sex discrimination in employment and retaliation. During the following year, my attorney at that time, Elizabeth Spahn, complied with defendant's production request by (ROA 11) producing and offering to produce most of the requested documents. We objected to two paragraphs (11 and 17). The bulk of the documents at issue are, by definition, documents of which defendant had copies prior to making the request (e.g., correspondence, contracts between plaintiff and defendant, defendant's

personnel administration materials relevant to plaintiff's position. As to these, we agreed to make available those which were in plaintiff's but not defendant's possession.

My attorney also prepared, served on Warner Lambert,and filed interrogatories (ROA 12), and agreed to a date for Warner Lambert to take my deposition. In July, 1978, following extensions of the period for responding, Warner Lambert objected to answering each and every interrogatory (ROA 15). In August, 1978, the court, sua sponte, sustained objections to about half of the interrogatories and overruled the objections to the remainder(DOCKET p. 1). Warner Lambert obtained additional time to respond (ROA 16, 17).

Due to my attorney's acceptance of employment in another state, I had to find new counsel and I notified Warner Lambert's attorneys that I would not be able to appear

for deposition (ROA 18). My new attorney, Frank Cochran, entered his appearance in October, 1978 (ROA 19, 27) and, in November, 1978, met with three of Warner Lambert's attorneys to discuss defendant's objections to the interrogatories. Defense counsel declined to discuss the objections until after my deposition had been taken. Warner Lambert also raised issues relevant to document production that had been exhaustively covered with previous counsel in 1977 (Eginton to Cochran 11/15/78, appended to ROA 54). Shortly thereafter, Mr. Cochran stipulated that Warner Lambert need not respond to plaintiff's interrogatories "until after further application for such compliance"(ROA 20) and, in December, 1978 made a motion for partial summary judgment to strike Warner Lambert's second through sixth affirmative defenses (ROA 21, 22).

To aid in preparing their response to the motion, Warner Lambert requested addi-

tional documents (Eginton to Cochran 1/22/79 appended to ROA 54). In response, plaintiff agreed to a compromise of objections to documents requested under par. 17 of the production request and provided copies of documents in February, 1979 (Cochran to Eginton 2/12/79, Eginton to Cochran 3/20/79 appended to ROA 54). Plaintiff also indicated continued adherence to previous counsel's response to defendant's production request (ROA 11) and the availability for copying at Mr. Cochran's office of my studies for Warner Lambert (Cochran to Eginton 2/12/79 appended to ROA 54).

In March, 1979, following extensions of time to respond (ROA 24, 25, 26) defendant answered the motion for partial summary judgment (ROA 28, 29). Oral argument on the motion was in April, 1979 and the motion was denied in January 1980 (ROA 33).

In May, 1979, Mr. Cochran told me I should

seek other counsel and, in December, 1979 moved to withdraw as counsel (ROA 31), a motion he adjourned (ROA 32). Exchanges between Mr. Cochran and myself followed.He made a second motion to withdraw in June, 1980 (ROA 34, 36),to which I objected in a letter to the court (ROA 35). Following a hearing in October, 1980 (ROA 37, 38), Judge Burns denied Mr. Cochran's motion in November 1980: "The movant having failed to demonstrate good cause, the motion is denied on the present record without prejudice to renewal" (DOCKET p. 3).

In December, 1980, Mr. Cochran phoned one of Warner Lambert's attorneys to enquire when they planned to take my deposition and to ask for answers to my interrogatories. In reply, Warner Lambert indicated no immediate interest in taking my deposition (Nichols to Cochran 1/13/81 appended to ROA 54). They made no reference to answering my interrogatories and again rais-

ed issues relating to document production that had been covered with previous counsel in 1977. Replying, Mr. Cochran again raised the question of defendant's plans for taking my deposition and indicated the need for answers to my interrogatories. He stated he would respond regarding document production "as soon as I have instructions from my client on that issue" (Cochran to Nichols 1/19/81 appended to ROA 54).

In April, 1981, the clerk sent a (local) Rule 16 notice of proposed dismissal to counsel of record. By letter dated May 21, 1981, Mr. Cochran responded in part as follows (ROA 39):

> Judge Burns ruled late in 1980 denying my motion for leave to withdraw as counsel for the plaintiff, well within the one year set on the criterion for dormancy. Further discussion between myself and Dr. Fennell have been protracted, but should be concluded in the next month or less. Accordingly, the case should not be dismissed.

The clerk replied extending the time to "respond to the Rule 16 notice to Septem-

ber 22, 1981" (ROA 40).

In June, 1981, I wrote to Judge Burns requesting that she reconsider Mr. Cochran's motion of June 1980 to withdraw as my attorney. I mentioned that I had not heard from Mr. Cochran since March 1981 although I had written to him three times and added (ROA 41):

> ..I want to ask you to turn Mr. Cochran's motion over to another judge or to a magistrate so that Mr. Cochran will not feel inhibited, as he indicated he was in your presence, about stating his reasons for wanting to withdraw as counsel."

After further efforts on my part (ROA 42, 43), the clerk issued a briefing schedule for "plaintiff's second motion to withdraw as counsel," dated November 17,1981 (ROA 44). Presumably because Mr. Cochran did not file a memorandum in support of the motion by November 30, 1981 Magistrate Latimer denied the motion on December 18, 1981 (DOCKET p. 3).

By letter dated November 30, 1981 to Magistrate Latimer, an attorney for Warner

Lambert requested an extension of time to "December 24 to respond to the renewed motion to withdraw" (ROA 46) and in a hand-delivered letter to the magistrate, dated December 22, 1981 requested that the action be dismissed "for failure to comply with Local Rule 16 by September 22, 1981"(ROA 47).

In late December 1981 and early January, 1982, I had spoken by phone with various persons in the offices of the clerk, of Magistrate Latimer and of Judge Burns. I learned that one of Warner Lambert's attorneys had written to Magistrate Latimer requesting that my case be dismissed. I then phoned and wrote to the clerk, opposing the dismissal of my case, saying in part (ROA 48):

> I certainly have been doing all I could to get my case moving and, apparently, some more time is still needed to settle the question of Mr. Cochran's appearance on my behalf.
>
> I don't know what additional information you might need from me but I shall be happy to answer any questions you may have about this matter.

I also learned that a settlement conference under the aegis of Judge Zampano was going to be scheduled and it was suggested that I might use that conference as a means of seeking clarification of Mr. Cochran's reasons for wanting to withdraw as counsel. A meeting took place attended by Judge Zampano, Frank Cochran and myself without, however, solving any of the problems in the lawyer-client relationship. Later, the case was sent back to Judge Burns without resolution.

Judge Burns held a status conference on December 14, 1982. Her ruling on defendant's motion to dismiss reports (p. 5):

> At the close of the conference the Court instructed counsel that it would entertain motions to compel and a motion to dismiss. Thereafter, on December 29,1982 defendant filed its motion to dismiss and, on January 18, 1983, plaintiff moved to compel answers to interrogatories dated May 3, 1978. Magistrate Latimer denied both motions by endorsement on February 10, 1983, and both parties filed objections to those rulings.

Under Local Rule 2 for United States

Magistrates, both motions came before the Court for de novo determination. The Court granted defendant's motion to dismiss which was affirmed by the second circuit court of appeals. In May 1984, I moved under Rule 60(b)1 for relief from judgment on grounds of substantial factual errors in the Ruling on defendant's motion to dismiss.

REASON FOR GRANTING THE WRIT

Errors of fact and law resulted in the dismissal of my case from the district court and, again, in the appeals court's affirmation of dismissal. I ask this court to intervene so that I shall not unjustly be deprived of the opportunity to have my case against Warner Lambert tried on its merits.

The relevant wording of Rule 41(b) is as follows:

> . . . for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may

> move for dismissal of an action or any claim. . .

In the present case, where is the behavior that permits a Rule 41(b) dismissal?

1. There was no "failure to prosecute." The district court's ruling acknowledges that the case was prosecuted diligently in part. There was a period of sparse docket entries for which a substantial explanation exists and is well documented. But plaintiff never failed to respond to a trial or pretrial calendar or any other step necessary to bring the case to trial.

2. There was no failure by plaintiff "to comply with these rules." As plaintiff's affidavit shows, defendant never moved to compel production and its objections to all of plaintiff's discovery requests violated the spirit of the discovery rules.

3. There was no failure to obey an "order of court."

In what follows, I shall briefly indicate some of the errors that led to the

dismissal of my case.

1. Erroneous Use of Rule 41(b) in regard to discovery issues.

Rule 41(b) applies particularly to the trial stage of litigation and is not available to use in connection with discovery issues. (Societé, supra). If it were true that there had been a "delay in effecting agreed discovery," Warner Lambert had a fully adequate series of remedies under Rule 37(b)2. But defendant chose not to proceed under that applicable rule, possibly because it had most of the disputed documents in its possession.

2. Appeals court mistakenly equates the present case with Chira, supra, and Lyell, supra.

The appeals court states: "A delay in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under rule 41(b). See e.g., Chira," and also: "No clear abuse of dis-

cretion is shown. See, e.g., Lyell . . "

In Chira, however, the defendant first obtained an order setting an outside time for discovery under rule 37(b)2, before moving to dismiss under Rule 41(b). To the extent that the statement of the appeals court implies that discovery issues may be a ground for dismissal under Rule 41(b) without any attempt to secure a Rule 37 order, it is in plain conflict with both Rule 37 and the supreme court opinion in Societé.

Similarly, in Lyell, there is a procedural history vastly different from my case, including the fact that, in Lyell, a motion for reconsideration of dismissal was denied because excuses asserted by plaintiff were not "reflected in the record or raised at any time prior to dismissal" (p. 40). In my case, plaintiff's problem was stated in numerous contemporaneous communications with the Court (ROA 35, 37, 38, 41, 42, 43).

3. Substantial errors of fact in the dis-

trict court's ruling cloud the discovery history.

Opposing counsel differ in regard to an agreement on discovery. Defendant talks of a three-part agreed sequence: document production by plaintiff, deposition of plaintiff, possibly followed by defendant's answers to plaintiff's interrogatories (ROA 54 par. 9). Defendant takes the position that since document production has not occurred nothing else can happen (e.g., ROA 54 par. 14). Plaintiff's view of the agreed upon sequence involves two stages: plaintiff's deposition then defendant's answers to plaintiff's interrogatories (e.g., Cochran to Nichols appended to ROA 54). Plaintiff's compliance with defendant's production request has been attended to and plaintiff's answer to the production request is on file.

The district court accepts defendant's rather than plaintiff's view, mainly,

because it, like defendant, holds that plaintiff has yet to comply with defendant's production request (App. C, p.10). But plaintiff's response to each paragraph in the production request is on file (DOCKET 11).

The district court is also in error regarding the evidence that supports defendant's version of the discovery agreement. The ruling (App. C, p.13) is clearly wrong in stating that there is an agreement "long ago embodied in a stipulation and reflected in correspondence" that "document production would precede other discovery." The only stipulation relating to discovery is that of November 1978 and it speaks only of defendant's response to plaintiff's interregatories (DOCKET 19 and ROA 20).The only supporting correspondence originates from defendant (Eginton to Cochran 11/15/78 appended to ROA 54).

The district court wrongly characterizes a letter from defense counsel of 1/22/79

as notifying plaintiff's counsel of "the specific documents it was requesting." In fact, the letter in question simply repeats verbatim defendant's broad production request to which plaintiff's response was on file since October 1977.

4. Defendant's violation of the spirit of discovery rules.

Defendant hindered the efficient progress of the litigation. Warner Lambert refused to confer about and did not move to compel discovery. Warner Lambert violated the spirit of the discovery rules by:

a. Objecting to every one of plaintiff's discovery requests, for the most part frivolously,

b. Failing to avail itself of discovery opportunities plaintiff made available (my deposition, my projects),

c. Ignoring the fact that I had filed a complete response to their production request and attempting to compromise

production issues, in place of moving to compel,

d. Creating a supernumerary quarrel about production of documents most of which it actually had in its possession,

e. Interposing this redundant discussion about document production as a block to other discovery (plaintiff's deposition, defendant's answers to plaintiff's interrogatories).

5. Based on the content of the district court's ruling and the statements in the appeals court opinion, it is factually inaccurate to say, as the appeals court states, that "the trial judge considered relevant aspects of the history of the litigation in making her determination that the case should be dismissed."

In noting that "The trial court may properly consider the relationship between the litigant and her attorney. See e.g., Link v. Wabash Railroad", the appeals court

overlooked the fact that the district court did not take the lawyer-client relationship into account:

a. Internal evidence in the Ruling (App. C) indicates that the district court did not consider the relationship between the litigant and her attorney. The matter is not discussed, Link is not cited in the Ruling in any context, and the District Court did not cite cases on the issue of lawyer-client relations.

b. If the district court had considered the lawyer-client relationship in the light of Link, and specifically what I was reporting about the relationship in my communications with the court, the outcome may have been different.

In holding clients responsible for their attorneys' actions, Link supports a client's right to information relevant to the litigation. In my letters to the district judge, I repeatedly stressed my need

for information and clarification from my attorney in order to be able to proceed with the litigation. The outcome could have been different in two respects:

i. The district judge may have seen her way to respond positively to my request for help in getting the information I needed. (Consider the list of unanswered questions in my letter to Judge Burns, October 1980, and my final sentence (ROA 38):

> Beyond requesting that Mr. Cochran's motion be denied, I shall appreciate anything you can do to cast light on my unanswered questions.

Consider also my request for guidance on other ways to handle the situation in my letter of June 1981 (ROA 41):

> I shall be glad to answer any questions you may have about this matter or hear your suggestions for other ways to deal with it.

ii. Having failed to respond substantively to pleas such as the above, Judge Burns could have considered the existence of the

problem as a factor explaining the sparse docket entries in the period from January through December 1982. As stated in SEC v. Everest Management, 466 F Supp, 167, 171 (SDNY 1979), a case cited in the Ruling (App. C p. 4):

> Dismissal for want of prosecution may be denied where a satisfactory explanation for plaintiff's delay exists.

6. An issue of exceptional importance arises because the lower courts' opinions rest on factual conclusions that are not based on evidentiary determination.

a. In stating that Fennell would not "allow the discovery procedure agreed upon in 1978 to proceed," and that "Fennell would not permit her attorney to withdraw," the appeals court states conclusions on issues where plaintiff and defendant assert different facts and where there has been no evidentiary hearing. On each issue, the appeals court favors defendant. Evidence is available and could be examined rela-

tive to these issues. It has not been examined.

i. Discovery. It is clear that plaintiff consistently maintained a very different version of the discovery dispute from the version defendant asserts. The appeals court, of course, relied on the ruling of the district court. However, in the context of a Rule 41(b) motion to dismiss, the dispute between plaintiff and defendant on the subject of discovery was not given the detailed examination it might have received in the appropriate context of Rule 37. Defendant has simply persistently proclaimed that plaintiff was in error on the matter of document production without putting these claims to an appropriate test in the form of a Rule 37 motion to compel production. It is not a foregone conclusion that defendant would have prevailed in a motion to compel production of the documents to which plaintiff objected.

ii. Attorney-Client. In their brief before the appeals court Warner Lambert, who can have no first hand knowledge of these matters, nonetheless present a view of plaintiff's lawyer-client relationship that is different from the one I presented in plaintiff's principal brief. In any event, the power to "permit" an attorney to withdraw rests with the court not the client.

b. In the absence of an evidentiary hearing, the courts must favor plaintiff rather than defendant. Already in a weaker position, procedurally, compared to a person who resists summary judgment, a person who resists dismissal is, surely, entitled to at least the procedural presumption favoring a party who resists summary judgment: Her version of the facts must be taken as true for a Rule 41(b) motion.

CONCLUSION

There is nothing in Rule 41(b) that permits dismissal in the present instance.

The district court did not dismiss my action sua sponte. In order to make a case for dismissal, defense counsel erroneously rely on:

1. A local rule which confers no substantive rights upon a defendant to insist that a case be dismissed.[2]
2. Defendant's claims regarding the existence of a discovery agreement that document production precede other discovery, which is recorded only in correspondence written by defense counsel.
3. Plaintiff's supposed failure to effect agreed discovery for which defense counsel had available, but did not use, the procedures of Rule 37.

Indeed, contrary to the claim of defense

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[2] "District court rule respecting dismissal in civil actions in which no proceeding has been taken for a period of two consecutive years is for administrative purposes, and confers no substantive rights upon a defendant to insist that a case be marked as dismissed." (Wholesale Supply Co v. South Chester Tube, 20 FRD 310, 310).

counsel, it is defendant rather than plaintiff who has impeded the progress of discovery.

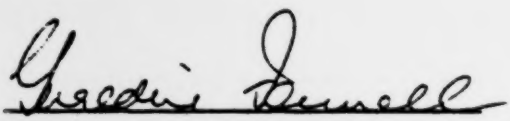
The rules of procedure and commentary on the rules regarding involuntary dismissal and summary judgment consistently express sensitivity to the constitutional requirement of due process, a concern that I do not find reflected in the opinions of the lower courts or the procedures that were employed in my case.One authority notes, for example:

> Indeed, there are constitutional limitations upon the power of a court, even in aid of its own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause (Societé, supra, 1094). For this reason the appellate courts scrutinize very carefully dismissals with prejudice made on these grounds. 9 Wright & Miller ¶2369 193.

In sum, I have a meritorious case against Warner Lambert which has not yet been heard. Events in the district court and the appeals court have prevented my

grievance against Warner Lambert from being resolved on its merits. Specifically, unconstitutional applications of procedural rules have abridged my right to "petition the Government for a redress of grievances" and have violated my right to "due process of law."

Respectfully submitted,



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DATED: 9 June 1984

APPENDIX

C O N T E N T S

DECISION OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November, one thousand nine hundred and eighty-three.

Present:

Honorable Irving R. Kaufman,

Honorable Ellsworth Van Graafeiland,

Circuit Judges,

Honorable Clement F. Haynsworth, Jr.,

US Court of Appeals, Fourth Circuit,

sitting by designation.

GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

against

83-7473

WARNER LAMBERT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. The trial court's dismissal of appellant's suit for failure to prosecute was not an abuse of discretion. In a motion for dismissal under Fed. R. Civ. P. 41(b), the trial court may properly consider the relationship between the litigant and her

attorney. See, e.g., Link v. Washburn Railroad Co., 370 US 626 (1962). In the instant case, appellant failed to prosecute for over four years, apparently because of a dispute with counsel. Fennell would not permit her attorney to withdraw, nor would she allow the discovery procedure agreed upon in 1978 to proceed. A delay in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under Rule 41(b). See, e.g., Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 668 (2d Cir. 1980). In sum, the trial judge considered relevant aspects of the history of the litigation in making her determination that the case should be dismissed. No clear abuse of discretion is shown. See, e.g., Lyell Theatre Corp. v. Loews Corp., 682 F 2d 37 (2d Cir. 1982).

2. Appellant's other assertions are equally without merit.

3. Accordingly, the judgment is affirmed.

ORDER OF SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of March one thousand nine hundred and eighty-four.

DR. GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

WARNER LAMBERT COMPANY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Dr. Geraldine Fennell, etc., pro-se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,

Clerk.

by Francis X. Gindhart,

Chief Deputy Clerk.

RULING OF DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

CIVIL NO.

V. :

N77-252

WARNER LAMBERT COMPANY :

RULING ON DEFENDANT'S MOTION TO DISMISS

This action, filed in 1977 by a former employee of defendant Warner Lambert Company who alleges she was unlawfully discharged on the basis of sex,[1] is before the Court for resolution of troublesome issues raised by a motion to dismiss for failure to prosecute. Pursuant to Rule 41(b) of the F. R. of Civ. P.[2] and Local

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[1] Plaintiff alleges defendant violated her rights under Title VII of the Civil Rights Act of 1964, 42 USC ¶2000e et seq.

[2] In relevant part, Rule 41(b) states: "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Rule 16(a) of the Rules of Civil Procedure of the United States District Court for the District of Connecticut,[3] defendant urges dismissal on the grounds that plaintiff has not prosecuted the case diligently, has not conducted discovery necessary to prepare for trial and failed to explain why dismissal was inappropriate when required to do so by order of the clerk of the court under Local Rule 16(a). Defendant contends plaintiff's languor has prejudiced it because crucial witnesses have died, left the employ of defendant, or suf-

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[3] Local Rule 16(a) provides:

> In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record on or before the first of October in each year. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within 30 days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this rule may be suspended, altered, or rescinded by the court for cause shown. (Emphasis added).

fered the usual dimming of memory that occurs with the passage of time. Plaintiff denies defendant's claim of prejudice and shifts the blame to Warner Lambert for the fact that this case has not progressed beyond preliminary stages of discovery. Notwithstanding the Court's reluctance to deprive any party of an opportunity for resolution of his or her case on its merits, the Court is of the opinion that this case is one of the few where the drastic remedy of dismissal is the proper sanction for plaintiff's failure to prosecute diligently.

DISCUSSION

There can be no question that this Court has the inherent power to dismiss a case from its docket because of a plaintiff's failure to prosecute the action. Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 665 (2d Cir. 1980). This power should be exercised sparingly, however, and only where the entire procedural his-

tory of the case demonstrates that the plaintiff has not prosecuted the action with diligence. Merker c. Rice, 649 F 2d 171, 173-74 (2d Cir. 1981). While prejudice to the defendant is not a precondition to dismissal, its absence is a relevant consideration where the failure to prosecute is moderate or attributable to excusable neglect. Messenger v. United States, 231 F Supp. 328, 331 (2d Cir. 1956); SEC v. Everest Management Corp., 466 F Supp 167, 171 (SDNY 1979). Additionally, a defendant who has contributed to the problem should not be rewarded with a windfall dismissal when a lesser sanction will suffice. See Index Fund, Inc. v. Hagopian, 90 FRD 574, 580 (1981).

From its commencement on June 17, 1977, until the Court denied plaintiff's motion for partial summary judgment on January 3, 1980, this case was litigated diligently by both parties. Since early 1980, on the other hand, virtually the only action in

this case has been unsuccessful attempts by counsel for plaintiff to withdraw from the case. On December 14, 1979, plaintiff's attorney filed his first motion to withdraw. While that motion was still pending, counsel filed a second motion to withdraw on June 20, 1980. On November 25, 1980, this Court denied the first motion on the grounds that counsel had not shown the requisite good cause for withdrawal. Though the second motion was not similarly denied or otherwise endorsed, it appears the Court and the parties treated that motion as withdrawn without prejudice to renewal.

The next action in this case was initiated by the Clerk of the United States District Court for the District of Connecticut who, acting pursuant to Local Rule 16, notified plaintiff on April 29, 1981, that "[t]he case below is subject to being dismissed ... [u]nless some action is taken

or a satisfactory explanation of why it should not be dismissed is submitted to the Court within thirty (30) days ...." Three weeks later, by letter dated May 21, 1981, counsel for plaintiff advised the clerk of the court that the case should not be dismissed since his motion to withdraw was not ruled on until November 25, 1980, and because "discussions between myself and Dr. Fennell have been protracted, but should be concluded in the next month or less." In light of this response, plaintiff's period for complying with the Rule 16 notice was extended to September 22, 1981. Despite this extension, plaintiff did not prosecute the case and the next proceeding in the action was on November 17, 1981, when Magistrate Latimer, acting at the request of this Court, issued a briefing schedule on the second motion to withdraw as counsel. Although this procedure gave counsel a second op-

portunity to justify his motion for withdrawal, counsel ignored the briefing schedule and consequently the motion was denied on December 18, 1981. It should be noted that defendant, who obtained an extension of time to respond to the briefing schedule and who apparently was unaware that the motion had been denied, wrote to the magistrate on December 22, 1981, asking that the case be dismissed due to plaintiff's failure to take any action on the case by September 22, 1981, as required by the Rule 16 notice.

The Court did not act on the defendant's request to dismiss and the clerk of the court did not dismiss the action automatically for plaintiff's failure to comply with the Rule 16 notice. Instead, this Court referred the case to Judge Zampano for a pre-trial conference. A conference was held on March 26, 1982, but the case was not settled and still plaintiff took

no action to prosecute the suit. To ascertain the status of the case, this Court held a conference on December 14, 1982.Counsel for plaintiff suggested the Court should impose a final discovery schedule so the case could soon be ready for trial. Counsel for defendant, however, strongly objected to this recommendation and renewed his request that the action be dismissed for failure to prosecute. At the close of the conference the Court instructed counsel that it would entertain motions to compel and a motion to dismiss. Thereafter, on December 29, 1982, defendant filed its motion to dismiss and, on January 18, 1983, plaintiff moved to compel answers to interrogatories dated May 3, 1978. Magistrate Latimer denied both motions by endorsement on February 16, 1983, and both parties filed objections to those rulings.

In opposition to the motion to dismiss, which under Local Rule 2 for United States

Magistrates is before the Court for a de novo determination, counsel for plaintiff argues that he never disobeyed any order of the Court and that the lack of progress toward readiness for trial is attributable to defendant's consistent refusal to respond to outstanding interrogatories. As for the first contention, the file shows that plaintiff never complied with the Rule 16 notice that was extended until September 22, 1981. Although Magistrate Latimer considered a renewed motion to withdraw in late 1981, counsel cannot claim credit for renewing the motion since he never responded to the briefing schedule. In addition, the motion was not revewed within the time period established by the Rule 16 notice. Finally, inasmuch as defendant objected to the renewed motion to withdraw on the grounds that the case should be dismissed for failure to prosecute, it cannot be asserted that defendant acquiesced in the

continued status of the case as a pending action.

With respect to plaintiff's second argument shifting the blame to defendant, it is not supported by the record. Contrary to the position now taken by plaintiff, throughout the past three years the onus has been on plaintiff to comply with defendant's request for production of documents before defendant could be required to respond to plaintiff's interrogatories. Moreover, by Stipulation of November 21, 1978, it was agreed that defendant would not respond to plaintiff's first and only set of interrogatories "until after further application for such compliance ...." No such further application was made until January 18, 1983. In addition, as reflected in a letter to plaintiff's counsel on November 15, 1978, it was defendant's understanding that both sides would exchange certain documents

before proceeding to further discovery. By letter dated January 22, 1979, counsel for defendant notified plaintiff's counsel of the specific documents it was requesting. On February 12, 1979, plaintiff's counsel gave defendant various documents but objected to the production of others. Defendant responded with a letter dated March 20, 1979, in which counsel listed the documents received, observed that he could not reply to plaintiff's objection because it was not addressed to specific documents, and suggested "that we hold this discovery situation in abeyance until after the resolution of the Motion for Partial Summary Judgment ... ."

Plaintiff's motion for partial summary judgment was denied on January 3, 1980, and the next indication of an intent to litigate the case was in a letter of January 13, 1981, to plaintiff's counsel where counsel for defendant stated, in response

to a telephone inquiry regarding the scheduling of plaintiff's deposition, that "[d]efendant desires to take plaintiff's deposition as soon as possible ... [after we] complete our examination of plaintiff's documents." In response to this letter, plaintiff's counsel sent defendant a letter dated January 19, 1981, stating, "I will respond to your inquiry regarding production of documents as soon as I have instructions from my client regarding that issue." No response was forthcoming, however, and the next communication from plaintiff's counsel was a letter dated December 15, 1982, a day after the Court held a status conference. In his letter counsel took the position that he had "not agreed to defer compliance [with the interrogatories] at any time since December 29, 1980," when he asserts he requested compliance by telephone. This position seems to contradict that taken by counsel in his letter of January 19, 1981, and, in

any event, the stipulation of November 21, 1978, required plaintiff to make written application to the Court for compliance with the interrogatories. Thus, plaintiff's assertion that the delayed progress of the case should be attributed to defendant's "intransigent posture" is untenable in light of the agreement, long ago embodied in a stipulation and reflected in correspondence, that document production would precede other discovery.

Given this procedural history, necessarily reviewed here at length, the Court cannot fairly avoid the conclusion that this case has not been prosecuted with due diligence. In addition to plaintiff's complete noncompliance with the Rule 16 order, plaintiff has taken no action to prepare her case for trial since the Court denied her motion for partial summary judgment. Although dismissal is a harsh remedy, it must be recognized that "[d]elays have dan-

gerous ends, and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of diligence are impotent." Chira v. Lockheed Aircraft Corp., supra at 668.In this case, where plaintiff was put on notice of possible dismissal by a Rule 16 notice in 1981 but took no action until 1983, despite defendant's request for dismissal in late 1981, the Court reluctantly concludes that dismissal is appropriate.

CONCLUSION

For the reasons herein stated, defendant's objections to the ruling of Magistrate Latimer on its motion to dismiss for failure to prosecute are sustained and, after a de novo review, the motion to dismiss is granted.

SO ORDERED,
ELLEN BREE BURNS
USDJ

DATED: New Haven, Connecticut, 2 May 1983

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

CIVIL NO.

VS. :

N 77-252

WARNER LAMBERT COMPANY:

JUDGMENT

This cause came on for consideration on defendant's motion to dismiss before the Honorable Arthus H. Latimer, United States Magistrate, and on February 10, 1983, said motion having been denied, and, thereafter, the objection to said denial having come for consideration before the Honorable Ellen Bree Burns, United States District Judge, and a Ruling on Defendant's Motion to Dismiss having been filed on May 2, 1983, granting said motion, after a de novo review,

It is ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant dismiss this action. Dated: 6 May 1983.

APPENDIX D-1

NO. 83-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,

Petitioner,

—against—

WARNER-LAMBERT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent Warner-Lambert Company

July 10, 1984

Question Presented for Review

Did the District Court, in May 1983, abuse its discretion in dismissing, for lack of prosecution, a complaint filed in June 1977 based upon events which are alleged to have occurred between 1971 and 1974, where:

(a) except for limited document production, no discovery had taken place in the action since it was filed in June 1977; and

(b) no discovery whatsoever had taken place since February 1979; and

(c) plaintiff had taken no action to prosecute the action since April 1979; and

(d) plaintiff had engaged in a running dispute with her counsel since May 1979, but adamantly refused either to discharge counsel, permit him to withdraw or permit him to proceed with the case; and

(e) plaintiff failed to take any action to prosecute the action for a period in excess of twenty months after a notice was issued in April 1981 by the District Court pursuant to a local rule, requiring plaintiff to take action or submit a satisfactory explanation as to why the case should not be dismissed; and

(f) such lengthy delay prejudiced defendant?

Rule 28.1 Statement

TO BE SUPPLIED

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NO. 83-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,

Petitioner,

—against—

WARNER-LAMBERT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondent Warner-Lambert Company ("Warner-Lambert") in opposition to the petition for a writ of certiorari.

Rules Involved

Rule 41(b), Federal Rules of Civil Procedure, provides in relevant part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 16(a), Rules of Civil Procedure of the United States District Court for the District of Connecticut, in the form in which it existed at all times relevant to this case,* reads:

> *Rule 16. Dismissal of Actions by the Clerk.*
>
> (a) *For Failure to Prosecute.* In civil actions in which no action has been taken by the parties for one year, the Clerk shall give notice of proposed dismissal to counsel of record. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the Court within thirty days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this rule may be suspended, altered, or rescinded by the Court for cause shown.

---

* Rule 16(a) was amended effective January 1, 1984.

Statement of the Case

On June 17, 1977, Geraldine Fennell ("Fennell") commenced this action, charging that she was discharged in 1974 because of sex discrimination and in reprisal for events which are alleged to have occurred in 1971. Although she appeared in the Court of Appeals and appears in this Court *pro se,* Fennell was represented by counsel throughout the entire litigation until the case was dismissed in May 1983 for lack of prosecution.

At the time Warner-Lambert filed its motion to dismiss, the case was five and one-half years old. Yet, except for production in 1977 and 1979 of a small number of documents (A29-A62; A126),* there had been no discovery in the case whatsoever. A brief description of the events leading to this situation follows:

On August 9, 1977, less than two months after the commencement of the action, Warner-Lambert filed a request under Rule 34 for documents (A22-A24). Numerous categories of documents were objected to, including all documents relating to plaintiff's employment and termination. Obviously, such documents are among the most highly relevant documents in an employment discrimination case. Yet, Fennell objected to their production (A27), and even now takes the position (Petition, pp. 3-4) that she was not required to produce such documents because defendant should first have specified which of those documents were in its possession.

In May 1978, Fennell served extensive interrogatories on defendant, approximately half of which were later

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* Citations are to the appendix filed by Warner-Lambert in the Court of Appeals for the Second Circuit.

stricken by the District Court, and defendant noticed Fennell's deposition for July 1978, which was thereafter adjourned at Fennell's request because her then counsel had announced plans to move to Massachusetts. On October 30, 1978, new counsel, Frank Cochran, filed his notice of appearance on behalf of plaintiff (A63).

On November 15, 1978, new counsel for plaintiff conferred with counsel for defendant about the status of discovery in the case. As a result of that conference, it was agreed that discovery would proceed in the following sequence: production of documents first, to be followed by plaintiff's deposition; after which defendant would respond to plaintiff's interrogatories, if necessary. This agreement was set forth in a contemporaneous letter of Warren Eginton, Esq., then counsel for defendant, which states in relevant part (A121-A122):

> This will confirm our agreement on the following procedures in the above matter, as reached during the course of our conference this morning at your office.
>
> With respect to the outstanding documents which have not yet been produced under our Rule 34 request dated August 5, 1977, we will furnish you within the next couple of weeks with an itemization of those categories which we have not as yet received. . . . In responding to that letter, we would appreciate it if you would indicate a time frame within which you will either produce the documents or otherwise state the position of your client with respect to such production.
>
> With respect to your desire to examine certain documents from the files of Warner-Lamber, I understand that you will send me a letter within

> the next couple of weeks setting forth the categories of such documents and we will advise you of a reasonable time frame for production or of our position with respect to such production.
>
> We have agreed that the deposition of Dr. Fennell will proceed after the above-referenced document exchange has been completed, and tentatively during the latter part of January, 1979 on a mutually agreeable basis.
>
> Finally, we have agreed to defer the filing of Warner-Lambert's response to plaintiff's first interrogatories dated May 3, 1978 in view of our common expectation that the document exchange and the plaintiff's deposition may render superfluous responses to many, if not most, of the outstanding interrogatories. Accordingly, I enclose herewith a stipulation. If you find it to be satisfactory, will you kindly complete the execution and file it with Mr. Markowski's office.

In connection with this agreement, plaintiff's counsel signed the enclosed stipulation and filed it with the District Court. On November 21, 1978, the stipulation was ordered accordingly by the District Court (A64). The stipulation provided that defendant need not respond to plaintiff's interrogatories unless and until there was a further application for compliance, with proper opportunity for defendant to respond.

On December 19, 1978, Fennell filed a motion for partial summary judgment to deny or strike certain affirmative defenses asserted by Warner-Lambert based upon plaintiff's failure to timely file her charges of discrimination and her failure to file any charge of retaliation

with the EEOC, as required by law (A65). During the course of preparing its response, defendant requested and obtained from plaintiff in February 1979 several documents relevant to those affirmative defenses which had been sought in its request in August 1977 (A123-A126). Plaintiff's counsel, however, suggested that any further discovery be postponed until plaintiff's motion for partial summary judgment was decided, stating that he would "resist all further discovery requests preceding that motion" (A126). Defendant's counsel agreed to defer further discovery pending disposition of the motion.

On April 23, 1979, Fennell's motion for partial summary judgment to deny or strike the affirmative defenses was argued before the District Court. On January 3, 1980, in a ten-page memorandum of decision, the District Court denied Fennell's motion (A69-A79).

In accordance with the earlier agreements of counsel, the road was now clear to resume discovery. During the next three years, however, Fennell failed to proceed with discovery as previously agreed and appears to have devoted her attention to a dispute with her attorney, whom she refused to allow either to withdraw from or to resume work on the case.

In May 1979, several weeks after the argument of plaintiff's motion for partial summary judgment, plaintiff's counsel told Fennell that he wished to withdraw as her attorney and she should seek other counsel (Petition, pp. 6-7). On December 14, 1979, Fennell's counsel filed a motion requesting leave to withdraw (A66-A67). On June 20, 1980, while that motion was still technically pending, plaintiff's counsel filed a second motion for leave to withdraw as counsel (Petition, p. 7), which Fennell opposed despite the fact that her counsel had explained to her, on numerous occasions, why he no longer wished

to represent her (A84). On October 22, 1980, a hearing was held before the District Court, of which defendant had no notice at the time, and at which only Fennell and her counsel appeared (A83-A91).

Fennell adamantly refused to agree to her counsel's withdrawal. Indeed, shortly after the October 22, 1980 hearing, Fennell wrote a lengthy letter to the District Court, again requesting that her counsel's motion be denied (A92-A93), and the following month, the District Court acquiesced (Petition, p. 7).

Having thus persuaded the District Court to deny counsel's motion to withdraw, Fennell nevertheless refused to let him proceed with the case. As Fennell herself stated in her principal brief on appeal before the Court of Appeals for the Second Circuit (Brief, pp. 18-19):

> Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following Judge Burn's denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions (ROA 38), or to have released him, left too many questions unanswered. I felt that my actions from then one [sic] under any of the three options, would not be the informed actions of a responsible person.

It thus appears that the failure to proceed with discovery subsequent to the November 1980 denial of counsel's motion to withdraw stemmed directly from Fennell's refusal to allow her counsel to resume work on the case.

In December 1980, plaintiff's counsel made some attempt to deal with the situation. He inquired of counsel for Warner-Lambert concerning the taking of plaintiff's depo-

sition. On January 13, 1981, Warner-Lambert responded, reiterating its desire to take Fennell's deposition as soon as possible after Fennell produced documents in response to its request dated August 5, 1977. In response, Fennell's attorney acknowledged the 1978 agreement respecting the sequence of discovery and stated by letter dated January 19, 1981, a copy of which is shown as being sent to Fennell, that: "I will respond to your inquiry concerning production of documents as soon as I have instructions from my client regarding that issue." (A131) (See Petition, pp. 7-8).

There was, however, no response from plaintiff's counsel until almost two years later at a status conference before the District Court on December 14, 1982 where plaintiff's counsel indicated that no documents would be produced (A117-A118). In his affidavit of January 7, 1983, plaintiff's counsel confirms that, as of December 14, 1982, "he had no authority to agree to produce documents not already produced" (A136).

On April 29, 1981, more than a year and a half before the December 14, 1982 status conference, the Clerk of the District Court had issued a notice under Local Rule 16 of proposed dismissal for plaintiff's failure to prosecute (A94). Thereafter, in response to a letter from plaintiff's counsel, the Clerk extended until September 22, 1981 the date by which plaintiff was required to take some action in the case or furnish a satisfactory explanation as to why the action should not be dismissed (A96). The September 22, 1981 date arrived, but no action to prosecute the case had been taken and no explanation had been given as to why the action should not be dismissed.

On December 22, 1981, counsel for Warner-Lambert wrote a letter to the Court requesting that the action be dismissed for plaintiff's failure to comply with Local Rule

16. On January 4, 1982, Fennell personally wrote a letter to the Clerk of the District Court opposing Warner-Lambert's request that the case be dismissed (Petition, p. 10). Thus, it is beyond dispute that, as early as January 4, 1982, Fennell had actual knowledge that her case was in danger of being dismissed for lack of prosecution. Nevertheless, during the next year, Fennell did not take a single step to proceed with outstanding discovery matters.

At the time of the December 14, 1982 status conference, this case was almost five and a half years old. It related to events, some of which had occurred more than a decade earlier. A key witness having knowledge of the circumstances surrounding Fennell's 1974 termination had died. A number of other witnesses had left Warner-Lambert. The passage of time and the involvement of these witnesses in other activities had undoubtedly diminished their recollections as to the events in issue. The prejudice to Warner-Lambert was obvious (A109).

On December 29, 1982, Warner-Lambert moved to dismiss the action pursuant to Rule 41(b), Federal Rules of Civil Procedure, and Rule 16(a), the Rules of Civil Procedure of the United States District Court for the District of Connecticut, for plaintiff's failure to prosecute (A106-A107).

After a hearing on March 7, 1983, the District Court, on May 2, 1983, granted Warner-Lambert's motion to dismiss (A144-A153). In its opinion, the District Court found (A148) that plaintiff had never complied with the Rule 16 notice that was extended until September 22, 1981. The Court next considered plaintiff's excuse that defendant was to blame for the lack of prosecution. The District Court specifically found that such an excuse was "not supported by the record" (A149) since the parties

had an agreement, "long ago embodied in a stipulation and reflected in correspondence, that document production would precede other discovery" (A151).

In determining that dismissal rather than a lesser sanction was appropriate, the District Court held (A151):

> Given this procedural history, necessarily reviewed here at length, the Court cannot fairly avoid the conclusion that this case has not been prosecuted with due diligence. In addition to plaintiff's complete noncompliance with the Rule 16 order, plaintiff has taken no action to prepare her case for trial since the Court denied her motion for partial summary judgment. Although dismissal is a harsh remedy, it must be recognized that "[d]elays have dangerous ends, and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of diligence are impotent." *Chira* v. *Lockheed Aircraft Corp., supra* [634 F.2d 664] at 668 [2d Cir. 1980]. In this case, where plaintiff was put on notice of possible dismissal by a Rule 16 notice in 1981 but took no action until 1983, despite defendant's request for dismissal in late 1981, the Court reluctantly concludes that dismissal is appropriate.

On June 6, 1983, Fennell filed *pro se* a notice of appeal. On November 25, 1983, the Court of Appeals for the Second Circuit unanimously affirmed the dismissal. On March 13, 1984, Fennell's petition for rehearing and suggestion for rehearing *en banc* was denied. On June 11, 1984, Fennell filed *pro se* with this Court a petition for writ of certiorari.

Meanwhile, on May 4, 1984, Fennell filed *pro se* in the District Court of Connecticut a motion for relief from

judgment, which is scheduled for argument on July 13, 1984. On June 25, 1984, Fennell filed with the Court of Appeals for the Second Circuit a "Supplementary Petition for Rehearing/Motion For Recall of Mandate", which is currently pending.

ARGUMENT

I. No reason exists for granting the writ of certiorari.

As is obvious from the Petition itself, Fennell here seeks to have this Court review, still again, the facts found by the District Court and reviewed by the Court of Appeals. This Court, however, does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

None of the considerations which would justify the grant of a Petition for certiorari is apparent here. This case has no significance whatsoever to anyone other than the litigants. All that is involved here is the question whether the District Court abused its discretion in dismissing this case for lack of prosecution. The Second Circuit held that discretion had not been abused. No further review is called for or warranted.

II. The decision below was clearly correct.

Dismissal under Rule 41(b) for failure to prosecute is a matter of the trial court's discretion. *Link* v. *Wabash Railroad Co.,* 370 U.S. 626, 633 (1962). The District Court's opinion shows the care and deliberation with which Judge Burns reached the conclusion that dismissal here was the proper remedy.

The function of a reviewing court in such circumstances is limited: a Rule 41(b) dismissal for failure to prosecute is reversible only if an abuse of discretion has been shown. *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980); *Theilmann* v. *Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972). As recently noted in *Lyell Theatre Corp.* v. *Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982):

> The scope of review of an order of dismissal is confined solely to whether the trial court has exercised its inherent power to manage its affairs within the permissible range of its discretion.

No abuse of discretion was shown, and the Second Circuit found that there had been no such abuse.

In reviewing the exercise of that discretion, an important policy consideration concerns the trial court's control of its docket necessary to achieve the orderly and expeditious disposition of cases, and its need to deter litigants and their counsel from disobeying court rules. *Chira* v. *Lockheed Aircraft Corp.*, 634 F.2d 664, 668 (2d Cir. 1980). *Cf. National Hockey League* v. *Metro Hockey Club*, 427 U.S. 639, 642-643 (1976). These policy considerations also strongly favor the District Court's decision. The case was almost six years old when the motion to dismiss was decided. There had been virtually no discovery; and plaintiff had failed, for well over a year, to comply with the notice under Local Rule 16.

Finally, as this Court made clear in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962), it is no defense to a motion to dismiss for lack of prosecution that the failure to prosecute was the fault of the lawyer rather than the client. Here, however, there is no need to reach even that issue since the record establishes that it was Fennell herself who prevented her case from proceeding.

Fennell was always free to obtain new counsel or cooperate with her existing attorney in prosecuting her case. For example, Fennell was copied on her counsel's letter to defendant's attorney dated January 19, 1981, which states that he would obtain instructions from her with respect to defendant's request for documents before the taking of her deposition (A131). Yet, as late as December 1982, a year after she was aware that her case was in danger of being dismissed under Local Rule 16 for failure to prosecute, Fennell apparently never gave her attorney any instructions as to how to respond. Thus discovery remained at a standstill for almost two years, from January 1981 until December 1982. Fennell is thus directly and personally responsible for the failure to prosecute which forms the basis for the District Court's dismissal.

CONCLUSION

For each of the reasons assigned, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record

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Attorneys for Respondent
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Dated: July 10, 1984

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 28.3 of the Supreme Court Rules, he served the foregoing Brief upon petitioner by mailing on July 10, 1984, three true and correct copies thereof, first class mail postage prepaid to petitioner Geraldine Fennell, *pro se,* 59 Rennell Street, Bridgeport, Connecticut 06604.

REX W. MIXON, JR.

Sworn to before me this
10th day of July, 1984

Notary Public

NO. 83-2063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

V.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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Pro se

FOREWORD

Respondent's brief in opposition to my petition for writ of certiorari requires a reply. Respondent has written a statement of the case which is so completely biased that it is tantamount to argument and its argument disregards the legal issues I raise. In sum, its tendentious version of the case's history and evasive argument are tailored to obscuring rather than meeting my argument.

In this response, I shall address arguments first raised in respondent's brief and I shall indicate omissions in respondent's statement of the case that are material to the points of law on which I base my petition.

Respondent has provided the text of two of the relevant rules but, significantly, not of Rule 37, Federal Rules of Civil Procedure. Because of its importance to the issues, I include the relevant text of

Rule 37.

* * * * * * * * *

As respondent has pointed out, there are motions pending in the district court and the court of appeals, which seek to correct factual errors.

If this Court finds it cannot review this case on the present state of the record, I would ask that it retain jurisdiction pending resolution of the motions in the lower courts.

RULE 37(a), Motion for Order Compelling Discovery, reads in relevant part:

(2)... if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling ... inspection in accordance with the request ...

RULE 37(b), Failure to Comply with Order, reads in relevant part:

(2)...If a party ... fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule ... the court ... may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made ... shall be taken to be established for the purpose of the action in accordance with the claim of the

party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders ...;

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, ...

C O N T E N T S

TABLE OF AUTHORITIES

REPLY TO BRIEF IN OPPOSITION

I. RESPONDENT'S ARGUMENT (pp. 11-13)

A. Petitioner's Issues of Law

Under respondent's first point i.e., "No reason exists for granting the writ," I learn of two mistakes that I made in preparing my petition. Let me, then, first correct the mistakes.

1. Factual Issues. Among the issues of law that I stated as reasons for granting the writ of certiorari, I raised some issues of fact. Respondent points out (p. 11) that this Court "does 'not grant a certiorari to review evidence and discuss specific facts.' United States v. Johnston, 268, US 220, 227 (1925)." Accordingly, I withdraw my petition to have this Court review specific facts. Although respondent ignores them, the issues of law that my petition raises are significant, as I shall now explain.

2. Rule 17 Considerations. My second mistake was to have neglected to state my reasons for granting the writ in the context of Rule

17 "Considerations Governing Review on Certiorari." Respondent erroneously claims (p. 11) that this "case has no significance whatsoever to anyone other than the litigants." The present issue is not the significance of my underlying case against Warner Lambert. It is, rather, the illegal denial of a hearing on the merits of the underlying case. As in Societé (203, 212), the decisions of the lower courts raise important questions as to the proper application of the federal rules of civil procedure in light of constitutional doctrine underlying these rules. Accordingly, I shall now show the connection between the issues of law that I raise and the considerations that govern review on certiorari, as stated in Rule 17.

a. Conflict with This Court's Decisions. (Rule 17.1c). My case comes to this Court from the appeals court in a form that portrays me, personally, as preventing a "discovery process agreed upon in 1978" to pro-

ceed and as "not permitting her attorney to withdraw." I dispute both characterizations. However, even if these characterizations were true in my case, this Court should still reverse the appeals court decision, on grounds of conflict with this Court's previous decisions. Specifically, the lower courts granted/affirmed defendant's Rule 41(b) motion to dismiss:

- that made allegations of discovery lapses for which, according to this Court's opinion in Societé, the procedures of Rule 37 are appropriate,
- where the district court was cognizant of behavior of plaintiff's attorney that made it impossible, contrary to this Court's opinion in Link, that the plaintiff could be deemed to "have 'notice of all facts, notice of which can be charged upon the attorney'(Smith v. Ayer, 101 US 320,326)."

b. Supervision of Judicial Proceedings (Rule 17.1a). The lower courts have so far departed from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision. In regard to the two key issues of the existence of a discovery agreement involving document production as its first step, and plaintiff's attorney's behavior, plaintiff and defendant assert different facts. Denying due process, the lower courts accepted defendant's version:

- Regarding discovery, the district court (and the appeals court) accepted the existence of a discovery agreement that is documented only in correspondence originating from defense counsel. Furthermore, by granting defendant's Rule 41(b) motion to dismiss, in which defendant made allegations of discovery lapses by plaintiff, in circumstances where defendant had not sought, much less obtained, an order to produce under Rule 37, the district court in effect granted a motion to compel without argument or examination and, further, assumed subsequent noncompliance with an order to produce.

- With regard to the attorney-client problem, plaintiff asked the guidance of the district court on how to handle the matter and asked repeatedly that a nonprejudicial forum be provided to examine it. Practically all of the communication that took place between plaintiff and her attorney in connection with his motions to withdraw is in the form of correspondence. It is available for examination at a hearing. Accordingly, it would be possible to review in detail the problem that plaintiff was confronting.

Although denying two motions to withdraw as counsel, the district court was not responsive to my requests for help in obtaining information from my attorney and made no reference to these matters in its ruling on the motion to dismiss.

Neither the district court nor the appeals court has suggested how I might more appropriately have handled the situation.

B. Discretion Abused.

With regard to the second point in res-

pondent's argument -- that the "decision below is clearly correct" respondent fails to confront the issues of law that I raise.Its claim that there was no abuse of discretion can acquire legitimacy through association with Chira, Theilmann, Lyell, and National Hockey only by innuendo (e.g., "disobeying (sic) court rules (sic) -- p. 12) and only on the assumption that the reader will fail to examine these other cases and compare their circumstances with my case.

Respondent's oblique evocations of Link (pp. 11, 12) fail to come to grips with Link's relevance to the present case. This Court should be aware that, contrary to respondent's implication (p. 12), I have not argued that some critical procedural lapse was my lawyer's fault and not mine. The record shows that no critical procedural lapse may be laid at plaintiff's door. Defendant is responsible for impeding the progress of discovery, in many ways, but most tellingly by failing to

use Rule 37 to move to compel production and thus lend credibility to its claimed need to obtain documents from plaintiff. Defendant scarcely needed instructions from plaintiff's counsel, much less from plaintiff, on the procedures available to it. Plainly in conflict with this Court's opinion in Societé, its claim (p. 13) that it waited for two years to hear from plaintiff is empty in light of its failure to move to compel even when the court invited motions to compel.

To the contrary, I argue:

a) that Link holds clients responsible for their attorneys' actions and deems clients informed of all facts chargeable to the attorney. The ability to maintain the assumption of shared information between attorney and client is a policy consideration of overriding importance. Yet, I found a system apparently unprepared to deal effectively with the critical breakdown that occurred here in the basis for responsible

litigation, and

b) that Link's allusion to plaintiff's possible remedy in a malpractice suit against the attorney, even if technically applicable in the present instance, is inappropriate in an action that addresses issues of human rights. Even a successful suit against an attorney cannot restore the career status and future prospects I had worked to achieve in the business world nor can it assert the right of a professionally qualified woman to contribute at the highest levels of corporate management.

Respondent has simply offered no material response to my argument that the district court illegally granted its Rule 41(b) motion to dismiss, i) based on alleged discovery lapses in the absence of a Rule 37 motion to compel production and ii) in circumstances where the court could not maintain the assumption of shared information between lawyer and client. Accordingly, far from there being no abuse

of discretion, as respondent claims, the decisions of the lower courts go beyond abuse of discretion in substantially violating the rules of procedure and the prior decisions of this Court.

II. RESPONDENT'S STATEMENT OF THE CASE (pp. 3-11).

In many places, respondent's statement of the case is significantly in error. For purposes of the present petition, I am being guided by the appeals court's emphasis on two issues. Accordingly, I shall restrict my comments to errors in respondent's statement relative to these two domains.

A. Discovery History -- The "1978 Agreement"

Omissions such as the following obscure the basis in discovery history for the first important issue of law on which I base this petition namely, that defendant erroneously used Rule 41(b) where, were its allegations correct, this Court in Societé has said the procedures of Rule 37 are proper:

Respondent's account of discovery history errs in omitting to state --

1. On page 3: that, in 1977, plaintiff had promptly filed a full response stating answers and objections to its production request,

2. On page 3: that, thereafter, it was up to defendant to move, under Rule 37, to compel production of any documents it needed if it was dissatisfied with plaintiff's response,

3. On page 4: that the discovery procedure that respondent claims opposing counsel agreed to in November, 1978, namely, a three-stage sequence starting with document production by plaintiff, exists only in correspondence originating from defense counsel,

4. On page 6: that "in accordance with the earlier agreement of counsel the road was now clear" for defendant to renotice plaintiff's deposition,

5. On page 7: that "subsequent to the No-

vember 1980 denial of counsel's motion to withdraw," by redundant discussion of document production in place of moving to compel, defendant thwarted its own discovery, even in the face of plaintiff's initiative in reminding it to renotice plaintiff's deposition; and that it thereby also thwarted plaintiff's discovery since plaintiff had agreed to permit defendant to take plaintiff's deposition before obtaining answers to plaintiff's interrogatories,

6. On page 9: that the statement "Fennell's attorney acknowledged the 1978 agreement respecting the sequence of discovery" is untrue with reference to a three-stage sequence that starts with document production by plaintiff. The letter dated January 19, 1981, written by Fennell's attorney (A131) to which respondent refers plainly acknowledged a two-stage agreement respecting the sequence of discovery, that starts with defendant's deposition of plaintiff.

7. On page 8: that during the status con-

ference of December 14, 1982, (as reported in the district court's ruling), plaintiff's request that "the court ... impose a final discovery schedule so the case could soon be ready for trial" was countered by a defendant who "strongly objected to this recommendation and renewed his request that the action be dismissed for failure to prosecute."

8. On page 8: that following the status conference, Warner Lambert could have a) responded positively to plaintiff's request for a conference to discuss their objections to my interrogatories, and/or b) moved to compel production of any documents they wanted, as the court invited. Rejecting both options, they moved to dismiss. When plaintiff's efforts to proceed with discovery were greeted by the motion to dismiss, only then did plaintiff go back on the agreement (to first permit defendant's deposition of plaintiff) and move to compel answers to plaintiff's interrogatories.

9. On page 10: that the finding of the district court to the effect that the "parties had an agreement, 'long ago embodied in a stipulation and reflected in correspondence that document production would precede other discovery'" is at variance with the record in that the stipulation refers only to the subject of defendant's response to plaintiff's interrogatories, and the only supporting correspondence originates from defense counsel.

10. On page 10, in the lengthy extract from the district court's ruling (second sentence): that the phrase "the Rule 16 order (sic)" is presumably a clerical error in that no order under Rule 16, or otherwise, was issued by the district court. The appropriate phrase i.e.,"Rule 16 notice (sic)," is to be found in the same extract (last sentence).

Omissions such as the above tend a) to deflect attention from defendant's role in obstructing the progress of discovery, b) to place on plaintiff sole responsibility for

the passage of time, to which respondent now so frequently alludes (e.g., pp. 1, 3, 6, 8, 9, 12, 13), and c) to obscure the basis in discovery history for one of the issues of law that petitioner brings to this Court's attention namely, that respondent failed to avail itself of Rule 37, using redundant discussion of plaintiff's supposed failure to respond to its production request to impede its own and plaintiff's discovery and, contrary to this Court's opinion in Societé, sought dismissal under Rule 41(b).

B. Plaintiff's Attorney-Client Relation

Assertions and omissions such as the following obscure the fact that the only action I could have taken, as a responsible litigant, was to seek clarification of my attorney's behavior, which to this day, I have failed to obtain notwithstanding repeated requests to the district and appeals courts.

1. On page 6: Respondent cannot know that

my counsel "had explained to her, on numerous occasions, why he no longer wished to represent"me.

2. On page 7: Respondent misrepresents my petition, by referencing its page 7 in support of the statement that "the District Court acquiesced" to my request that my attorney's motion to withdraw be denied. Citing code, rule, and cases, the judge denied the motion (ROA 29) "the movant having failed to demonstrate good cause" (Petition p. 7).

3. On page 7: Respondent omits the final sentences of my statement (Principal Brief p. 19). Following the sentence that "I felt that my actions from then on, under any of the three options, would not be the informed actions of a responsible person," I stated: "It would be unjust to deny me my day in court in circumstances where I could not responsibly have acted other than as I did and where I made good faith efforts to remedy the situation. The sparse docket entries following denial of my motion for partial summary judgment were due

to 'inability and not to willfulness, (or) bad faith' on my part. Societé, supra, 1096."

4. On page 8: Respondent omits all reference a) to the event that precipitated its letter of December 22, 1981, namely the briefing schedule on my attorney's second motion to withdraw as counsel; b) to my requests to the court to activate my attorney's dormant motion; and c) to the court's denying my attorney's second motion to withdraw as counsel.

5. On page 10: Defense counsel fail to mention that the ruling of the district court contains no reference to the problem for my litigation that my attorney's behavior caused notwithstanding the plain presence of the problem in at least six items in the record and, of course, its anomalous presence on half of the pages of respondent's brief on appeal, and in the de-

cision of the appeals court.

Assertions and omissions such as the above tend a) to create the impression that my reaction to my attorney's motions to withdraw was unreasonable; b) to obscure the fact that the judge, magistrate, my attorney himself (by failing to file a memorandum supporting his second motion to withdraw), considerations of code, rule, and case law, more than I, were decisive in preventing his withdrawal as counsel; c) to divert attention from the fact that I was denied the nonprejudicial forum that I requested to resolve the problem that my attorney's unexplained attempts to withdraw as counsel created for my litigation (Petition p. 9) and d) ignore totally the anomaly of the absence in the ruling of indication that the judge had considered that my attorney's actions undermined my status as responsible litigant, or my good faith efforts, well-documented in the record, to deal with the situation.

III CONCLUSION

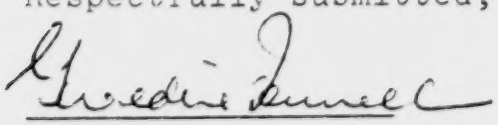
Based on the two issues of law on which I have focused in this paper, this Court should reverse the decision of the lower courts. In addition, other aspects of my argument include the following:

- The district court made no finding that defendant was prejudiced,
- The district court made no finding that supports the extreme sanction of dismissal,
- There was a mix of active and inactive prosecution,
- There was a period of sparse docket entries for which plaintiff offers a substantial explanation,
- Plaintiff's difficulties were known to the court during the period of sparse docket entries,
- Although plaintiff had requested it, the court issued no discovery schedule,
- No trial date had been set,
- In granting defendant's motion to dis-

miss for failure to prosecute, the court failed to consider the complete record and all the circumstances,

- The court was unable to consider all the circumstances in that the court's full understanding of plaintiff's difficulties would have required a hearing in which issues touching the merits might be raised,
- Although plaintiff asked for such a hearing, none was provided,
- There had been no trial of facts and the record contains mutually inconsistent affidavits,
- The court failed to note defendant's use of a "sleeping dogs" (Finley v. Parvin/ Dohrmann Co., 520 F 2d 386, 392 (2d Cir. 1975) strategy.

Respectfully submitted,



GERALDINE FENNELL, Pro se

59 Rennell Street
Bridgeport, CT 06604
Dated: 28 July 1984

NO. 83-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,

Petitioner,

—against—

WARNER-LAMBERT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S RULE 28.1 STATEMENT

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August 9, 1984

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GERALDINE FENNELL,
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Petitioner,

—against—

WARNER-LAMBERT COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S RULE 28.1 STATEMENT

Respondent Warner-Lambert Company ("Warner-Lambert") has no parent corporations. The common stock of Warner-Lambert is publicly traded on the New York Stock Exchange.

The following is a list of the subsidiaries of Warner-Lambert, as set forth in Exhibit 22 to the Form 10-K filed by Warner-Lambert with the Securities and Exchange Commission, showing the state or country of incorporation and the percentage of voting securities owned by Warner-Lambert or by subsidiaries of Warner-Lambert as of December 31, 1983. There have been no material changes since that date. Except as otherwise indicated, such subsidiaries are included in the consolidated financial statements.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Adams, S.A.	Spain	100	
Adams Dominicana, S.A.	Dominican Republic	100	
Adams France S.A.	France	100	
Ahmex, S.A.	Mexico	100	
American Chicle Company	Delaware	100	
American Food Industries, Inc. ..	Delaware	100	
Clark Gum Company Morocco.	Morocco	100	American Food Industries, Inc.
Chamberlain's (Proprietary) Limited	South Africa	96	
		4	Parke-Davis
Wilcox Sweets (Proprietary) Limited	South Africa	100	Chamberlain's (Proprietary) Limited
Chicle Adams, Inc.	New York	100	
Chicle Adams S.A.	Venezuela	100	Chicle Adams, Inc.
Chicle Adams S.A.	Colombia	100	(Direct & Indirect)
Chicle Adams, S.A. de C.V.	Mexico	100	
Cirsa S.A.	Venezuela	100	
Velarca S.A. ..:.....	Venezuela	80	Cirsa S.A.
Clark Gum Company N.V.	Belgium	100	
Compania de Chicle Adams, Inc...	New York	100	
Parke Davis & Cia. de Argentina, S.A.I.C.	Argentina	100	Compania de Chicle Adams, Inc.
Warner-Lambert Argentina, S.A.	Argentina	81.5	Compania de Chicle Adams, Inc.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
		18.5	Warner-Lambert Company A.G.
Chicle Adams del Uruguay S.A.	Uruguay	100	Compania de Chicle Adams, Inc.
Distribuidora Mercantil Centroamericana, S.A.	Delaware	100	
Distribuidora Mercantil Centroamericana de Costa Rica, S.A.	Costa Rica	100	Distribuidora Mercantil Centroamericana, S.A.
Empresas Warner-Lambert S.A...	Chile	70.6	
		29.4	Parke-Davis
Euronett, Inc.	Delaware	100	
Eversharp, Inc.	Delaware	100	
Family Products Corporation	New York	100	
Laboratorios Laprofa, Sociedad Anonima	Guatemala	100	Family Products Corporation
Laboratorios Warner, Ltda...	Brazil	100	Family Products Corporation
Golosinas Peruanas S.A.	Peru	100	
IMED Corporation	Delaware	100	
Med-Tech Ventures, Inc. ..	Delaware	100	IMED Corporation
IMED International Corporation.	Cayman Islands, British West Indies	100	
IMED Australia Pty. Limited	Australia	100	IMED International Corporation
IMED Canada Inc.	Canada	100	IMED International Corporation
IMED G.m.b.H.	Germany	100	IMED International Corporation

"Name of Corporation	State or Country of Organization		Percentage of Ownership
IED Ireland Limited	Ireland	100	IMED International Corporation
IMED Limited	United Kingdom	100	IMED International Corporation
IMED Management Services Limited	United Kingdom	100	IMED International Corporation
ıternacional Participacoes Ltda. .	Brazil	100	
Warner-Lambert Industria E Comercio Ltda.	Brazil	100	Internacional Participacoes Ltda.
Chadams Participacoes E Comercia Ltda.	Brazil	100	Warner-Lambert Industria E Comercio Ltda.
ıternational Affiliated Corporation	Delaware	100	
Farmaceutica y Comercial Sociedad Anonima	Bolivia	100	International Affiliated Corporation
Goedecke A.G.	Germany	87.96	International Affiliated Corporation
		11.44	Warner-Lambert International Capital Corporation
		.20	
Goedecke Gesellschaft m.b.H.	Austria	100	Goedecke A.G.
Adenylchemie G.m.b.H.	Germany	100	Goedecke A.G.
Institut fur Immunforschung und Serumherstellung Dr. Helmbold G.m.b.H.	Germany	100	Goedecke A.G.
International Company for Gum and Confectionery (Incogum) S.A.E.	Egypt	57	Goedecke A.G.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Parke Davis Afrique de l'Ouest	Senegal	100	Goedecke A.G.
Panserv-Anzeigen-Service G.m.b.H.	Germany	100	Goedecke A.G.
W. R. Warner & Co. G.m.b.H.	Germany	100	Goedecke A.G.
Parke-Davis Sendirian Berhad	Malaysia	100	International Affiliated Corporation
Invalpa S.A.	Peru	100	
Keystone Chemurgic Corp.	Delaware	100	
Chicle Adams C.A. Limited ..	Bermuda	100	Keystone Chemurgic Corp.
Productos Adams, S.A.	Guatemala	100	Keystone Chemurgic Corp.
Laboratories Substantia, Societe Anonyme	Belgium	100	
Laboratorios Substantia C.A.	Venezuela	80	
Laboratorios Sanitol Sociedad de Responsabilidad Limitada	Argentina	100	(Direct & Indirect)
Lambert & Feasley, Inc.	New York	100	
Lambert Pharmacal Company (N.Z.) Limited	New Zealand	100	
Manufacture de Confiserie Manuco	France	100	(Direct & Indirect)
*Meito Adams Co., Ltd.	Japan	50	
Parfums Ciro, Inc.	Delaware	100	
Parke, Davis & Company ("Parke-Davis")	Michigan	100	
Compania Medicinal La Campana, S.A. de C.V.	Mexico	38.4	Tabor Corporation
		61.6	Parke-Davis

*Subsidiary not consolidated

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Deseret International Sales Corporation	Utah	100	Parke-Davis
R. Jung G.m.b.H.	Germany	100	Parke-Davis
P-D Co., Inc.	Delaware	100	Parke-Davis
Davpar Company	Switzerland	100	P-D Co., Inc.
Capsugel A.G.	Switzerland	100	Davpar Company
S.A. Capsugel N.V.	Belgium	100	Davpar Company
Hidracina y Derivados S.A. .	Spain	100	Davpar Company
Laboratoris Park Davis, S.A.E.	Spain	100	Davpar Company
N.V. Parke, Davis & Cie., S.A.	Belgium	100	Davpar Company
Parke, Davis S.p.A.	Italy	65.17	Davpar Company
		1.50	Parke-Davis
		33.33	Warner-Lambert International Capital Corporation
Quimica Sintetica, S.A.	Spain	100	Davpar Company
Societe Financiere et Commerciale de Cadillac	France	100	Davpar Company
Parke Davis (Bahamas) Limited	Bahamas	100	Parke-Davis
Parke Davis & Co. Limited ..	Jersey, Channel Islands	100	Parke-Davis
Parke, Davis & Company, Inc. .	Philippines	100	Parke-Davis
Parke, Davis & Company, Limited	Pakistan	75	Parke-Davis
Warner-Lambert (Pakistan) Limited	Pakistan	100	Parke, Davis & Company, Limited

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Parke Davis Corporation	Taiwan	50	
		50	Parke-Davis
Parke Davis Inter-American Corporation	Delaware	100	Parke-Davis
Compania Farmaceutica Parke-Davis S.A.	Guatemala	100	Parke Davis Inter-American Corporation
Parke Davis International Limited	Bahamas	100	Parke-Davis
Laboratorios Indufarma, S.A.	Peru	100	Parke Davis International Limited
Parke-Davis International Sales Corporation	Delaware	100	Parke-Davis
Parke Davis Pty. Ltd.	Australia	100	Parke-Davis
Warner-Lambert Pty. Limited	Australia	100	Parke Davis Pty. Ltd.
Warner-Lambert (Services) Pty. Ltd.	Australia	100	Parke Davis Pty. Ltd.
Parke-Davis (Thailand) Limited	Thailand	100	Parke-Davis
Parke Davis de Venezuela, C.A.	Venezuela	100	Parke-Davis
Parke Davis Zaire S.P.R.L. ..	Zaire	100	Parke-Davis
Unilease, Inc.	Nevada	100	Parke-Davis
Richard Hudnut	New York	100	
Richard Hudnut S.A.	France	89	Richard Hudnut
		11	Parfums Ciro, Inc.
Parke-Davis	France	100	Richard Hudnut S.A.
Laboratoires Substantia, Societe Anonyme	France	81.1	Richard Hudnut S.A.
		18.9	P-D Co., Inc.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
General Diagnostics France, S.A.	France	100	Richard Hudnut S.A.
Richard Hudnut Limited	New Zealand	100	
Chilab (Realty) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Ltd.
Warner-Chilcott (Mfg.) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Ltd.
Schick Interamericana S.A.	Venezuela	100	
Servicos Technicos e Comercio "Sertico" Ltda.	Brazil	100	
"Protequim"—Productos Tecnicos—Quimicos Ltda.	Brazil	100	Servicos Technicos e Comercio "Sertico" Ltda.
Standard Laboratories, Inc.	Delaware	100	
Bathasweet Corporation	New York	100	Standard Laboratories, Inc.
"Substantia" Gesellschaft m.b.H..	Austria	100	
Tabor Corporation	Delaware	100	
Warner-Hudnut (Lanka) Limited	Sri Lanka	70	Tabor Corporation
TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.	Germany	100	(Indirect)
Zoomedica Frickhinger G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
West-Aquarium G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
West-Aquarium KG	Germany	96.5	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
		3.5	West-Aquarium G.m.b.H.
Warner-Chilcott, Inc.	Delaware	100	
Warner-Lambert Inc.	Nevada	94	
		6	Warner-Lambert International Capital Corporation
Warner-Lambert Canada, Inc. ..	Canada	100	
Adams Brands Inc.	Canada	100	Warner-Lambert Canada, Inc.
Parke-Davis Canada Inc.	Canada	100	Warner-Lambert Canada, Inc.
Deseret Canada Inc.	Canada	100	Warner-Lambert Canada, Inc.
Warner-Lambert Company A.G. .	Switzerland	100	
Adams (Thailand) Limited ..	Thailand	100	Warner-Lambert Company A.G.
Laboratorio Substancia/Parke-Davis, S.A.	Spain	75	Warner-Lambert Company A.G.
		25	Bathasweet Corporation
Cosmeticos Internationales, S.A.	Spain	100	Laboratorio Substancia/ Parke-Davis, S.A.
Warner-Lambert (East Africa) Limited	Kenya	100	Warner-Lambert Company A.G.
Warner-Lambert Export Limited	Ireland	100	Warner-Lambert Company A.G.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Warner-Lambert Peru S.A. ...	Peru	59	Warner-Lambert Company A.G.
		41	Tabor Corporation
Warner-Lambert de Panama, S.A.	Panama	100	(Indirect)
Warner-Lambert Financial Corp.	Delaware	100	
Warner-Lambert France Ltd.	Delaware	100	
Warner-Lambert Ges.m.b.H.	Austria	100	(Direct & Indirect)
Warner-Lambert Holland B.V. ..	Netherlands	100	
B.V. Substantia	Netherlands	100	Warner-Lambert Holland B.V.
Substantia—Produtos Farmaceuticos, Limitada	Portugal	99.5	B.V. Substantia
		.5	Laboratoires Substantia, Societe Anonyme
Eversharp Nederland B.V.	Netherlands	100	Warner-Lambert Holland B.V.
J.P. Distributie N.V.	Belgium	100	Eversharp Nederland B.V.
Schick-Eversharp Gesellschaft mit beschrankter Haftung.	Germany	100	Eversharp Nederland B.V.
Warner-Lambert International Capital Corporation	Delaware	100	
Adams Portugal Comercio E Industria Limitada	Portugal	90	Warner-Lambert International Capital Corporation
		10	Chicle Adams, Inc.
Richard Hudnut, S.A.	Spain	100	Warner-Lambert International Capital Corporation
Societe Civile de Recherches Techniques S.A.R.L.	France	100	Warner-Lambert International Capital Corporation

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Warner-Lambert International, N.V.	Netherlands Antilles	100	
Warner-Lambert International Company	Delaware	100	
Warner-Lambert Manufacturing (Ireland) Ltd.	Cayman Islands, British West Indies	100	
Warner-Lambert K.K.	Japan	100	(Indirect)
Parke, Davis K.K.	Japan	100	Warner-Lambert K.K.
Warner-Lambert Ltd.	Delaware	100	
Warner-Lambert (NZ) Limited .	New Zealand	100	
Warner-Lambert Philippines, Inc.	Phillipines	56.1	
		43.9	Parke-Davis
Warner-Lambert Scandinavia AktieBolag	Sweden	100	
Warner-Lambert Sweden AB	Sweden	100	Warner-Lambert Scandinavia AktieBolag
Warner-Lambert (Norway) A/S	Norway	100	Warner-Lambert Sweden AB
Warner-Lambert (Schweiz) A.G.	Switzerland	100	
Warner-Lambert Technologies, Inc.	Texas	100	
C. Reichert Optische Werke A.G.	Austria	99.99	Warner-Lambert Technologies, Inc.
C. Reichert Handelsgesellschaft m.b.H.	Austria	100	C. Reichert Optische Werke A.G.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Reichert Jung, S.A.	France	100	C. Reichert Optische Werke A.G.
W-L Technologies (Japan) Inc.	Japan	100	Warner-Lambert Technologies, Inc.
Warner-Lambert Technologies (Asia) Ltd.	Delaware	100	Warner-Lambert Technologies, Inc.
Warner-Lambert (U.K.) Limited	Delaware	100	
Fleming & Reichert-Jung Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Reichert-Jung Limited	United Kingdom	100	Fleming & Reichert-Jung Limited
William R. Warner & Co., Ltd.	United Kingdom	100	Warner-Lambert (U.K.) Limited
Adams Brands Sales, Limited	United Kingdom	100	William R. Warner & Co., Ltd.
Chilcott Laboratories, Limited	United Kingdom	100	William R. Warner & Co., Ltd.
Hall Borthers (Whitefield) Limited	United Kingdom	100	William R. Warner & Co., Ltd.
Richar Hudnut, Limited	United Kingdom	100	William R. Warner & Co., Ltd.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
Lambert Chemical Company, Limited	United Kingdom	100	William R. Warner & Co., Ltd.
TetraMin (U.K.) Limited ..	United Kingdom	100	William R. Warner & Co., Ltd.

The foregoing list omits 11 domestic subsidiaries and 57 foreign subsidiaries which considered in the aggregate would not constitute a significant subsidiary."

Respectfully submitted,

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Counsel of Record
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Attorneys for Respondent
Warner-Lambert Company

August 9, 1984

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 28.3 of the Supreme Court Rules, he served the foregoing Respondent's Rule 28.1 Statement upon petitioner by mailing on August 9, 1984, three true and correct copies thereof, first class mail postage prepaid to petitioner Geraldine Fennell, *pro se,* 59 Rennell Street, Bridgeport, Connecticut 06604.

REX W. MIXON, JR.

Sworn to before me this
9th day of August, 1984

Notary Public